

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
AT&T Corp. Petition for Declaratory Ruling	)	WC Docket No. 03-133
Regarding Enhanced Prepaid Calling Card	)	
Services	)	

**OPPOSITION OF QWEST SERVICES CORP.  
TO AT&T MOTION FOR STAY PENDING APPEAL**

QWEST SERVICES CORP.

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Qwest Services Corp. (“Qwest”) hereby files this Opposition to a motion filed by AT&T Corp. (“AT&T”)<sup>1</sup> for a stay of the Federal Communications Commission’s (“Commission”) February 16, 2005 *Order*<sup>2</sup> confirming that AT&T’s prepaid calling card services were telecommunications services for which appropriate interstate and intrastate carrier’s carrier charges were payable under the tariffs of local exchange carriers (“LECs”) providing access to AT&T for origination and termination of those services.

I. INTRODUCTION AND SUMMARY

AT&T requests that the *Order* be stayed pending AT&T’s appeal,<sup>3</sup> subject to AT&T’s procuring a letter of credit to cover what AT&T itself estimates are in excess of \$150 million in unpaid universal service charges that the *Order* emphasizes are due and owing by April 17, 2005. AT&T also requests that the *Order* be stayed insofar as it permits LECs to bring suit to collect past due access bills. Until the Commission’s *Order*, AT&T had either refused to

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<sup>1</sup> Motion for Stay Pending Appeal, Subject to Posting of Security, WC Docket No. 03-133, filed March 28, 2005.

<sup>2</sup> *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Order*, 2005 FCC Lexis 1216, FCC 05-41 (adopted on Feb. 16, 2005 and released on Feb. 23, 2005) (“*Order*”).

<sup>3</sup> Petition for Review, filed March 28, 2005, D.C. Cir. Case No. 05-1096.

pay carrier's carrier charges altogether on its prepaid calling card services (based on AT&T's position that its prepaid calling card service was an "information service" that was "exempt" from paying carrier's carrier charges), or AT&T paid interstate access rates on the intrastate traffic generated by its prepaid calling card services (based on the argument that all of its prepaid calling card services were interstate in nature).<sup>4</sup>

The standard for granting a stay of an order by the Commission follows the legal standard established in *Virginia Petroleum Jobbers Association v. FPC*.<sup>5</sup> A petitioner must show a substantial likelihood of success on the merits, the likelihood of irreparable harm in the absence of a stay, the lack of harm to others, and a benefit to the public interest. AT&T's motion meets none of these criteria. While AT&T's motion can be dismissed summarily, Qwest takes this opportunity to comment briefly on several aspects of AT&T's position.

Essentially, AT&T's motion is erroneous on all counts. First and foremost, its position on the merits is frivolous -- forcing an end-user customer to listen to a commercial message as a precondition to making a long distance call using a prepaid calling card service does not create an "information service." Even if it were an information service, AT&T -- as a facilities-based common carrier -- failed to treat its prepaid calling card appropriately for either access charge or universal service contribution purposes. AT&T's argument that the Commission erred in not making the *Order* applicable on a prospective only basis is predicated on a total misunderstanding of the nature of adjudication of past liability under past law. AT&T's claim of

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<sup>4</sup> AT&T has consistently taken both positions in this proceeding, despite the fact that they are fundamentally contradictory with each other. Its current position, as expressed in the Motion for Stay, seems to be that AT&T was required to pay carrier's carrier charges for its prepaid calling card traffic, but that only interstate charges needed to be paid. It should be noted that AT&T's current position -- that calls using its prepaid calling card are interstate for access charge purposes but information services for universal service contribution purposes -- is inherently and internally contradictory.

<sup>5</sup> 259 F.2d 921 (D.C. Cir. 1958).

irreparable harm is based on the assumption that the Universal Service Administrative Company can refuse to pay its own lawful debts. In fact, there is nothing in the AT&T motion that merits more than cursory review prior to denial.

## II. AT&T'S LEGAL POSITION IS COMPLETELY BASELESS.

Contrary to the legal requirement for a substantial likelihood of success, AT&T's legal positions are completely baseless. AT&T claims that forcing its prepaid calling card customers to listen to a commercial message magically transforms an entire long distance call between two persons in a single state either into an information service, an interstate service, or both.<sup>6</sup> There is no question that, in the absence of the act of forcing the calling party to listen to a commercial, all of AT&T's prepaid calling card calls would be classified as basic telecommunications services, jurisdictionalized based on the locations of the end points of the calls, and subject to appropriate state and federal access and universal service rules and payments.<sup>7</sup> Notwithstanding these established principles, AT&T claims that the coercive commercial message that it inserts into the service turns the long distance call into an "information service" and that, as an information service, none of these calls are subject to interstate universal service assessments.

AT&T also claims that, because of this information service designation, all of the calls are interstate, and therefore it must pay only interstate access charges (which seems to be AT&T's current position). However, AT&T also has contended that, on account of the putative information service classification brought about by forcing the calling party to listen to a commercial, the same calls need pay no access charges at all and may enter the exchange

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<sup>6</sup> At times this commercial message consisted of a political message urging callers to call the Commission or their Congressional representative to complain about the instant docket.

<sup>7</sup> This precise issue was addressed in *In the Matter of The Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services*, 11 FCC Rcd 1186 (1995).

networks of LECs as end-user calls, not carrier calls (avoiding access charges altogether).

AT&T's overall legal position is so patently frivolous that it needs no further comment -- and the Commission's *Orders* deal well with those arguments.

III. THE COMMISSION'S DECISION THAT LONG DISTANCE CALLS USING AT&T'S PREPAID CALLING CARD SERVICE WERE REQUIRED TO BE TREATED AS TELECOMMUNICATIONS SERVICES FOR PURPOSES OF UNIVERSAL SERVICE CONTRIBUTIONS AND ACCESS CHARGES WAS NOT APPLIED "RETROACTIVELY."

AT&T argues that the Commission erred in "failing to provide a reasoned justification for the decision to apply its rulings [in the *Order*] retroactively."<sup>8</sup> AT&T claims that its actions in withholding money from the Universal Service Fund and declining to pay LEC tariffed carrier access charges were done in good faith and, accordingly, retroactive application of the *Order* was unwarranted.<sup>9</sup> AT&T in this area completely misapprehends the applicable law.<sup>10</sup> AT&T's non-payment of its lawful bills, even if made with complete artlessness, does not excuse AT&T from proper payment once its mistake had been discovered. AT&T owes Qwest and other LECs for services rendered pursuant to their lawful tariffs, both interstate and intrastate. This requirement that AT&T pay its lawful bills comes from the carriers' tariffs, not from the *Order*. And this obligation is in no way modified by any assumption by AT&T that it did not need to pay the tariffed amount, good faith or otherwise. Similarly, AT&T's obligation to pay properly into the Universal Service Fund derives from law and was merely confirmed by the *Order*.

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<sup>8</sup> Motion at 18.

<sup>9</sup> *Id.* at 19-21.

<sup>10</sup> We assume here *arguendo* that AT&T's apparent efforts to conceal the true nature of this traffic by terminating it through affiliated competitive local exchange carriers ("CLECs") does not undercut its claim of good faith. To the extent that AT&T's good faith becomes an issue in future judicial proceedings, there will be ample opportunity to test the *bona fides* of AT&T's contention.

There is nothing retroactive in the *Order*. The *Order* merely confirmed what the law has been for many years.

The essential principle that adjudication or clarification of existing private rights based on current law does not constitute retroactive decision-making has been enunciated in a number of cases to which AT&T has been a party. For example, in *AT&T v. FCC*,<sup>11</sup> AT&T had brought a complaint against MCI pursuant to Sections 206-208 of the Communications Act.<sup>12</sup> AT&T sought a cease and desist order and damages. The Commission, acting on essentially the same reasoning AT&T now supports here, dismissed the complaint, in part based on the claim that it was issuing a notice of proposed rulemaking to examine the prospective rules that should apply in the situation challenged by AT&T. The Court found for AT&T and held that the Commission could not avoid its statutory obligation (when called upon to do so) to adjudicate private rights based on existing law no matter what it felt the law or rules should be in the future. The Court held that the Commission had the discretion to engage in the retroactivity analysis suggested by AT&T only when there had been a *bona fide* change in the law. In adjudicating a complaint involving present and past rights, the Commission did not have the discretion to make an interpretative decision on a “prospective only” basis. The Court observed, in concert with AT&T’s position at the time:

We do not think it appropriate to resolve this dispute and apply the five factor test [for retroactive application of a new rule] at this stage because we do not fully understand what the Commission sees as ‘the law’ to be applied retroactively. By implication, the Commission must be referring to a prospective change in its regulation, but we think it is analytically incoherent to consider whether that change should be applied retroactively until it is fashioned. If the Commission means, instead, only its acceptance of our MCI interpretation, it would have to explain why that is a change in the law.

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<sup>11</sup> 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI v. AT&T*, 509 U.S. 913 (1993).

<sup>12</sup> 47 U.S.C. §§ 206-208.

The Commission will also have to reconsider AT&T's damages claim. If the Commission continues to believe that retroactivity is an obstacle to recovery of damages, it must explain what it understands to be the applicable law and why that law constitutes a change that implicates retroactivity concerns.<sup>13</sup>

The instant case is likewise not a retroactivity case at all. AT&T owes money to Qwest pursuant to Qwest's lawful interstate and intrastate tariffs. This money is owed on account of services provided in the past, and AT&T owes this money to Qwest whether or not AT&T honestly believed that it owed the money or not. An adjudication of what the law was when this indebtedness was incurred is not in any way related to retroactive application of a new or changed rule or law. Similarly, AT&T owes money to the Universal Service Fund, and this money too is owed on account of the Commission's rules as they existed at the time AT&T incurred this liability. None of these debts is owed on account of the *Order*, which merely confirmed AT&T's long-standing indebtedness. AT&T's claim that the Commission is somehow acting in a retroactive fashion by confirming what the law was at the time AT&T purchased access services from Qwest and other LECs is simply not accurate, and is directly at odds with AT&T's own successful advocacy to the contrary (when money was owed to AT&T).

#### IV. AT&T'S CLAIM THAT OTHER CARRIERS HAVE BEEN INAPPROPRIATELY WITHHOLDING PAYMENTS FROM THE UNIVERSAL SERVICE FUND IS IRRELEVANT.

AT&T makes the odd argument (to no discernable purpose) that other carriers have been avoiding payment of universal service charges, and that the Commission's conclusion in the

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<sup>13</sup> 978 F.2d at 736-37. *See also MCI Telecommunications Corp. v. FCC*, 10 F.3d 842, 846-47 (D.C. Cir. 1993); *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1417-20 (D.C. Cir. 1995), *cert. dismissed*, *BellSouth Telecommunications v. FCC*, 517 U.S. 1129 (1996), *cert. denied*, *BellSouth Telecommunications v. FCC*, 517 U.S. 1219 (1996).

*Order* that numerous other carriers had indeed been compliant with the law was in error.<sup>14</sup> While AT&T's pointing out other potential scofflaws in the universal service payment area is useful as a public service, it is legally irrelevant. The *Order* specifically directs all carriers who may have been relying on the analysis rejected in the *Order* to avoid universal service payments to file amended FCC Form 499As within thirty days of the effective date of the *Order*.<sup>15</sup> Indeed, AT&T is directed, as an entity with apparent, or at least proclaimed, knowledge of carriers who have been unlawfully withholding payments from the Universal Service Fund, to notify the Universal Service Administrative Company and provide it with the information that it has included in its Motion.<sup>16</sup> We assume that AT&T will in fact comply with this requirement (if it has not done so already). This should clear up any possibility that these entities are somehow gaining a competitive advantage over AT&T and others who are (at least now) paying their lawful universal service contributions by unlawfully refusing to fulfill their own universal service obligations.

V. AT&T'S CLAIM OF "IRREPARABLE HARM" IS BASELESS.

AT&T's claim of irreparable harm, based on the assertion that the Universal Service Fund Administrator will not give AT&T its money back if it wins its appeal, is clearly frivolous. If the Universal Service Fund owes money to AT&T, it is difficult to imagine how the Administrator would resist a lawsuit requiring that that money be paid -- even if the Commission itself chose to resist such payment.

More significantly, AT&T misapprehends the impact of a stay of the *Order* on the ability of LECs to commence and continue legal actions to collect their properly tariffed access charges

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<sup>14</sup> Motion at 26.

<sup>15</sup> *Order* at ¶¶ 31, 64.

<sup>16</sup> *Id.* at n.67.

during the pendency of AT&T's appeal. Qwest's own pending lawsuit against AT&T<sup>17</sup> is not dependent on the *Order*. It is a lawsuit to collect charges due and owing under Qwest's tariffs, both interstate and intrastate. While the *Order* confirms the law under which the action is brought, that law and Qwest's right to payment for services rendered existed long before the issuance of the *Order*, and the *Order* is not the foundation of the suit (*i.e.*, the action is not brought as an action to enforce a Commission order under Section 407 of the Communications Act). It appears that AT&T is under the mistaken impression that its liability to pay the tariffed rates for interstate and intrastate access services is somehow derived from the *Order*. It is not.

VI. EVEN IF AT&T'S ARGUMENT THAT THE INVOLUNTARY COMMERCIAL MESSAGE WAS ITSELF AN INFORMATION SERVICE WERE ACCEPTED, THE LAW STILL WOULD NOT PERMIT AT&T TO DRAW FROM THAT FACT THE CONCLUSIONS THAT AT&T ADVOCATES.

Finally, it is worth observing that AT&T has been unsuccessfully attempting to have the Commission create the very regulatory scenario which the Commission rejected in the *Order* for many years. AT&T's claim to good faith reliance on the legal arguments it manufactured for this proceeding is belied by its earlier unsuccessful efforts to achieve precisely these same results in other regulatory contexts. But more significantly, AT&T's past efforts highlight the fact that, even if the commercial message that AT&T forces customers to listen to did constitute an information service, that fact would not exempt AT&T from either universal service contributions or properly calculated access charges.

AT&T's basic position on universal service is that, when a facilities-based carrier provides an enhanced or information service over its common carrier transmission facilities, the entire service becomes an enhanced or information service -- thus sharing in its entirety in the

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<sup>17</sup> *Qwest Corporation v. AT&T Corp., et al.*, Civil Action No. 05-RB-375 (BNB) (D. Colo. Complaint filed Mar. 1, 2005).

benefits and detriments that accompany this classification. Thus, AT&T claims that it need not make appropriate universal service contributions because it is not providing a telecommunications service -- the telecommunications service having been entirely absorbed into the AT&T information service (*i.e.*, the involuntary commercial). The Commission essentially mooted this argument by finding that forcing a long distance customer to listen to a commercial in order to make a call did not constitute an information service at all -- a finding that is clearly correct. But even if the mandatory commercial interruption did constitute an information service, the Commission's rules still would not permit the interpretation that AT&T attempts to give them.

AT&T's argument is an offshoot of what is called the "contamination theory," in which the Commission has held that, in the case of enhanced service providers other than facilities-based carriers providing enhanced services, enhanced services and resold basic services would be combined into a single enhanced service offering that was independent of the underlying carrier facilities over which they were provided.<sup>18</sup> There have been a number of instances in which the Commission has examined efforts to expand this "contamination theory" to facilities-based carriers.<sup>19</sup> AT&T made a concerted effort to have the Commission buy into this theory for enhanced services that made use of its own frame relay network in the mid-1990s, causing the Commission to rule:

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<sup>18</sup> See, *e.g.*, *Third Computer Inquiry*, CC Docket No. 85-229, *Notice of Proposed Rulemaking*, 50 Fed. Reg. 33581, 33586, 33588 (Aug. 20, 1985).

<sup>19</sup> When information services are offered over non-carrier transmission facilities, the general rule is that the contamination theory applies. The Commission has expressly declined to apply the contamination theory to information services offered by a carrier over its own facilities. *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling*, 17 FCC Rcd 4798, 4823-24 ¶ 41 (2002), *rev'd on other grounds, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9<sup>th</sup> Cir. 2003), *reh'g denied*, 2004 U.S. App. Lexis 8023 (9<sup>th</sup> Cir. Mar. 31, 2004) (*en banc*), *cert. granted*, 125 S. Ct. 655 (U.S. Dec. 3, 2004) (No. 04-281).

We also reject AT&T's contention that the contamination theory applies to its frame relay service and renders its entire InterSpan service offering an enhanced service. To date, the Commission has not applied the contamination theory to the services of AT&T or any other facilities-based carrier.<sup>20</sup>

The Commission expressly recognized this critical fact in establishing the rules to govern a situation where a facilities-based carrier combined an information service with its own common carrier telecommunications service:

The Commission has stated that merely combining telecommunications service with an enhanced service does not automatically deem the combined service enhanced. Rather, 'the issue is whether, functionally, the consumer is receiving two separate and distinct services.'<sup>21</sup>

Thus, the "contamination theory" on which AT&T seeks to rely has never applied to situations where AT&T has combined an information service with its own common carrier transmission facilities.

Of equal significance, the Commission adopted universal service contribution rules governing exactly the situation that would exist if the AT&T commercial message constituted an information service. In such a case AT&T would be offering a bundled information service/telecommunications service consistent with the Commission's rules governing such bundled offerings.<sup>22</sup> Those rules provide that AT&T may elect one of several approaches to universal service payments when it offers a bundled information/telecommunications service,

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<sup>20</sup> *In the Matter of Independent Data Communications Manufacturers Association, Inc., Memorandum Opinion and Order*, 10 FCC Rcd 13717, 13723 ¶ 42 (1995).

<sup>21</sup> *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, 16 FCC Rcd 7418, 7446 n.146 (2001) ("Bundling Order"), citing *In the Matter of Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration and Report and Order*, 13 FCC Rcd 5318, 5474-75 ¶ 282 (1997).

<sup>22</sup> *Bundling Order*, *supra*, n.21.

none of which include the option of not paying at all.<sup>23</sup> In other words, the existing universal service rules deal specifically with a situation where a facilities-based carrier combines an information service with a telecommunications service to create a single unified offering. Even if AT&T's argument were to be accepted, AT&T made a deliberate choice not to follow those rules, and to run the risk that the Commission would later rule against its position.

The point is that, even if AT&T were correct that its action of forcing a customer to listen to a commercial in order to make a long distance call was an information service, this classification still would not have brought about the results it seeks to claim have always existed. When AT&T carries an enhanced or information service on its carrier facilities, the underlying transmission is a basic telecommunications service regardless of the nature of the service riding on top of it. AT&T's efforts to bring about a contrary result in the past have been rebuffed. Indeed, the Commission adopted universal service contribution rules applicable to the scenario posited by AT&T, rules that AT&T chose to disobey notwithstanding its virtual concession that they applied to the AT&T service.

Similarly, AT&T had made precisely the jurisdictional claim rejected by the Commission in its *Order* in the past. In *The Time Machine*,<sup>24</sup> the Commission faced the issue of how to determine the jurisdiction of prepaid calling cards. As the Commission noted in the *Order*, the earlier *Time Machine* decision stood four-square against the position that AT&T was taking regarding its own prepaid calling cards, in that it specifically held that calls completed through a prepaid calling card platform would be jurisdictionalized based on the end points of the calls

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<sup>23</sup> See 47 C.F.R. § 54, Subpart H. See also *In the Matter of Federal-State Joint Board on Universal Service, Report and Order*, 17 FCC Rcd 24952, 24958-59 ¶ 10 (2002).

<sup>24</sup> *Time Machine*, 11 FCC Rcd 1186.

without regard to the location of the calling card platform.<sup>25</sup> AT&T had appeared in the *Time Machine* docket, presenting a service it called “Teleticket” which provided basic and enhanced services in a combined manner. AT&T itself had argued there that the “Teleticket” service was interstate in its entirety except in those rare cases where the customer was located in the same state as the AT&T 800 switch (Wyoming). The Commission responded to the AT&T argument in *Time Machine* in exactly the same manner as it responded nearly a decade later to AT&T’s almost identical argument regarding the jurisdiction of its service:

In addition, we reject the implication raised in the pleadings that the routing of debit card calls through a remote 800 switch renders them jurisdictionally interstate in nature. We have previously held that calls involving 800 switching should be treated for jurisdictional purposes as a single, end-to-end communications. Thus, we find that a debit card call that originates and ends in the same state is an intrastate call, even if it is processed through an 800 switch located in another state. It follows that we specifically reject AT&T’s apparent conclusion that its Teleticket service does not have an intrastate component except in Wyoming, where its 800 switch is located.<sup>26</sup>

Moreover, other commentators raised the argument that AT&T has raised in this proceeding -- claiming that AT&T’s Teleticket service was deregulated in its entirety as an enhanced service.

The Commission also rejected this argument, finding as follows:

We also reject the argument that AT&T’s provision of a debit card calling capability through Teleticket on a non-regulated basis supports TMI’s preemption request. AT&T provides Teleticket pursuant to a Comparably Efficient Interconnection (CEI) plan that includes interactive voice and interactive data enhanced services. The enhanced services provided through Teleticket are non-regulated services. The long distance calling capability using the Teleticket debit card, however, is a basic debit card interstate calling capability that must be taken by AT&T’s enhanced services provider pursuant to tariff.<sup>27</sup>

Our point in raising this past advocacy by AT&T is not to suggest that the Commission erred in its analysis in the *Order*. The Commission’s analysis in the *Order* was clearly correct: forcing a

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<sup>25</sup> *Order* at ¶¶ 22-23, 32.

<sup>26</sup> *Time Machine*, 11 FCC Rcd at 1190 ¶ 30 (emphasis supplied, footnotes omitted).

<sup>27</sup> *Id.* at 1192 ¶ 39 (footnotes omitted).

customer to listen to a commercial in order to make a long distance call is clearly not an “enhanced” or “information service” under any definition. But even if AT&T’s involuntary commercial message had been an enhanced service, AT&T’s conclusions would still not have been accurate. AT&T’s universal service obligations and its obligations to pay access charges would not have been affected at all even if AT&T’s characterization of its commercial message had been correct.

## VII. CONCLUSION.

The AT&T motion is neither legally nor factually credible and should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **OPPOSITION OF QWEST SERVICES CORP. TO AT&T MOTION FOR STAY PENDING APPEAL** to be:

1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 03-133; 2) served, via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com), and served via First Class United States mail, postage prepaid, on the partys listed on the attached service list.

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